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MONTANA PROSECUTOR

February, 1978 Volume 2, No. 2

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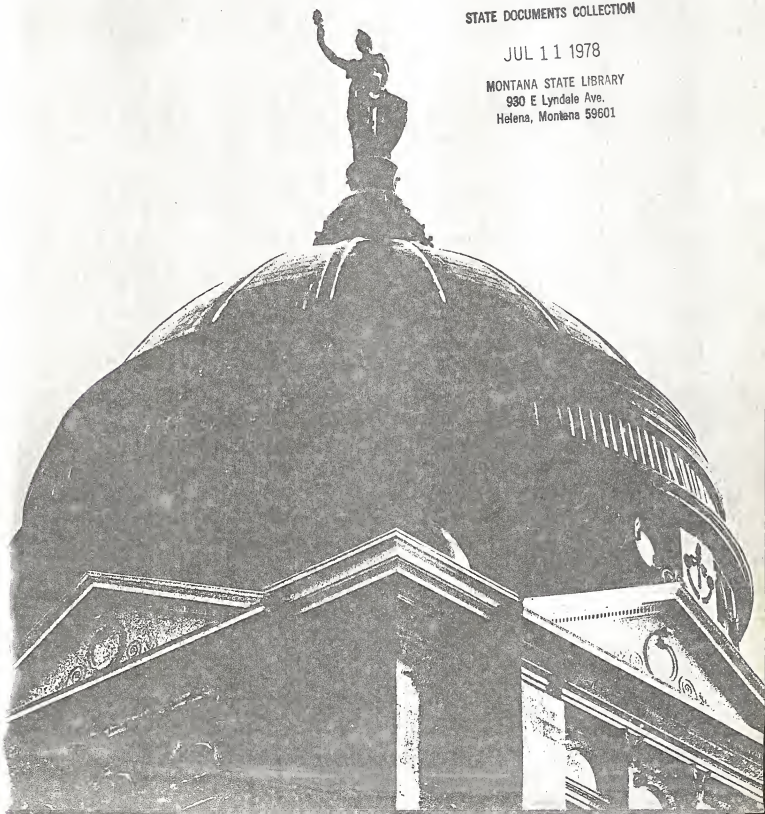


INTRODUCTORY NOTES

The grant for the in-state prosecutor training seminar in Bozeman, On April 6 and 7, 1978 at the Holiday Inn has been approved by the MBCC. The schedule of events for the Narcotics Seminar is as follows:

THURSDAY, APRIL 6, 1978

8:00 - 9:00 a.m.	REGISTRATION
9:00 a.m.	WELCOME
9:15 a.m.	INVESTIGATING ORGANIZED NARCOTICS TRAFFIC By Charles Heffernan (a) Basic investigation techniques (b) Case Management priorities (c) Staffing and operating a multi-agency task force
10:00 a.m.	Coffee Break
10:15 a.m.	INVESTIGATING ORGANIZED NARCOTICS TRAFFIC (continued)
11:30 a.m.	Lunch Break
1:00 p.m.	PRE-TRIAL PROBLEMS by Carlos Borja (a) Pre-Trial release (b) Attacks on indicment or information (c) Severance (d) Discovery (e) Suppression Motions
2:45 p.m.	Coffee Break
3:00 p.m.	CONSPIRACY by Charles Heffernan
4:00 p.m.	MEETING THE AFFIRMATIVE DEFENSES By Richard Strohm
5:00 p.m.	Adjourn
5:30 p.m.	Cocktail Hour

FRIDAY, APRIL 7, 1978

8:30 a.m.	FORFEITURE by Rick Strohm (a) Model Statute (b) How to use it
9:30 a.m.	Coffee Break
9:45 a.m.	TRIAL TECHNIQUES by Thomas Fortuin
11:00 a.m.	CONSTITUTIONALITY AND ENFORCEMENT OF OUTFITTER STATUTES - Panel Discussion
12:00 noon	Closing

All County Attorneys and their deputies are encouraged to attend. A substantial amount of money is being invested by the MBCC to provide this valuable in-state training that was previously available only to those few prosecutors who attended out-of-state seminars. Whether such projects will be funded in the future depends, to a considerable degree, upon whether Montana prosecutors take advantage of the training available. Additionally, as the program of events indicates, the seminar is expected to be professionally challenging and rewarding. As a result, attendance of all County Attorneys and their deputies is encouraged. Reservation requests for the seminar are enclosed and must be returned to the Holiday Inn by March 24, 1978. Each attendee will be assessed a $10.00 fee, which will go toward providing matching funds for the grant.

In addition to the presentation of the seminar materials, there will be a short presentation concerning the enforcement of outfitter statutes in Montana. There are approximately 450 outfitters in Montana doing business. Totally, the outfitters bring $18,000,000 a year into the State of Montana, but there are problems with the regulation of the industry and the help of Montana prosecutors is needed.

Also contained in this issue is a sample guilty plea inquiry and written pretrial agreement for possible use by Montana prosecutors and a schedule of out-of-state training seminars.

RECENT CASES AND NOTES

CHILD MOLESTING

Retribution and restraint are primary goals of sentencing for child molesting, 10-30 years proper. State v. Maxwell, 570 P.2d 506.

CORPUS DELECTI

Proof of intent necessary to establish the corpus delecti for burglary may be inferred from circumstantial evidence. There was sufficient proof of the corpus delecti necessary to admit defendant's confession where defendant was observed entering another's pickup and removing a battery from it. State v. Janise, 570 P.2d 499.

CROSS-EXAMINATION

Failure to allow cross-examination of the probation officer who prepared the presentence report was harmless error where the defendant showed no prejudice, complained only that he was inexperienced, and the judge gave a stiffer sentence than the probation officer recommended. State v. Maxwell, 570 P.2d 506.

INSANITY DEFENSE

Absent unique circumstances, not present here, the trial court need not raise the insanity defense for a defendant because of the presumption of sanity. The guilty plea was valid, and operated to waive the non-jurisdictional defense of insanity. State v. Johnson, 570 P.2d 503.

MIRANDA

Whether defendant is in custody is what determines whether Miranda is necessary and whether or not the defendant is in custody is an objective question. Neither probable cause nor an intention to arrest is dispositive, under the factors listed here, with the defendants being interrogated by undercover officers at their own swimming pool, Miranda was necessary. State v. Kennedy, 570 P.2d 508,

PROBATION CONDITIONS

Alcohol is not the proper medication to treat alcoholism with and an alcoholic can constitutionally be sent to prison without alcohol, so a probation condition that the defendant not use alcohol was proper. State v. Janise, 570 P.2d 499.

TELEPHONE THREATS

Defendant could not be convicted of making a telephone call to harrass another where the victim called the defendant, since the statute specifically made threatening phone calls unlawful only if the defendant called the victim. State v. Mercer, 570 P.2d 484.

CHAIN OF CUSTODY

Facts that campus police had access to evidence room and that the key to the evidence room was kept in a laboratory which anyone had access to went only to the weight and not the admissibility of the evidence. "Mere speculation" of tampering was insufficient to break the chain. Richards v. State, 569 P.2d 461.

PERJURY

Two witnesses requirement for perjury conviction does not literally require direct testimony of two separate witnesses, but is satisfied when there is direct testimony from one witness and additional independent evidence so corroborative of direct testimony that the two, when considered together, are sufficient to establish falsity of accused's statement under oath beyond reasonable doubt. United States v. Diggs (7th Cir.) 560 F.2d 266.

SEARCH AND SEIZURE

Where defendant, at time of arrest in his apartment, told officers he wanted to change his pants and began moving toward the edge of the bed, where one of the officers told him to "Hold it", and, as a precaution, the officer looked under the mattress where he found a gun, and where defendant was believed to be dangerous, the gun was lawfully seized. Haltiwanger v. United States (D.C.App.) 377 A.2d 1142.

THREATS

Prior threats of the defendant against the victim were admissible to show why the victim was carrying a gun, to show that defendant had malice, ill will, etc. toward the victim, and to show the victim was not the aggressor. People v. Gladney, 570 P.2d 231.

INADEQUATE ASSISTANCE

Where only defense was alibi, defense attorney's failure to investigate and produce potential witnesses who might cast doubt on identification testimony of prosecution witnesses constituted a withdrawal of a crucial defense, and therefore, defendant was denied constitutional right to adequate assistance of counsel. There is no logical distinction between defense attorney's inadequate preparation that results in the introduction of no testimony on a crucial defense and defense attorney's inadequate preparation that results in a failure to consider and introduce corroborating evidence needed to make a crucial defense substantial and effective. People v. Rodriguez, 141 Cal.Rptr. 118.

"Of course it has'ta be reported, it's income ain't it!"

NOTE

The United States Department of Health, Education and Welfare maintains a comprehensive listing of addresses of federal agencies who are responsible for accepting service of process, including garnishment summons. If it should become necessary to garnish the wages of a federal employee, in order to enforce a child support order, the Department will forward to you, upon request, a listing of addresses for the applicable federal agency.

AID AND ABET

Acting as lookout is sufficient to sustain a conviction for aiding and abetting. Here the jury could have characterized defendant's behavior as being a lookout, so there was sufficient evidence to sustain his conviction for aiding and abetting. State v. Green (Ariz.) 570 P.2d 755.

Where the jury could reasonably have concluded that defendant one was supervising concealing marijuana in a camper, evidence of defendant two watching, looking inside and saying something to defendant one, then closing the camper door was sufficient to sustain defendant two's conviction for aiding and abetting. State v. Green (Ariz.) 570 P.2d 755.

ARGUMENT

Argument that the jury should be outraged because of the victim's suffering during the incident and in having to come to court was not "wholly beyond the bounds of fair comment". State v. Griffin (Ariz.) 570 P.2d 1067

ARREST

Fact that victim told differing stories about which man held him down while the other took his wallet did not mean the police did not have probable cause to arrest the defendant since the victim consistently said the defendant was one of the two who held him down and robbed him. State v. Griffin (Ariz.) 570 P.2d 1067.

CHANGE OF JUDGE-CONTINUANCE

A motion for a change of judge does not entitle the moving party to any length continuance, further, a statement by a judge that criminals are getting off too easily is not grounds for disqualification. State v. Myers (Ariz.) 570 P.2d 1252.

CONSTITUTIONALITY OF STATUTES

The case that upholds constitutionality of the marijuana statutes against attacks of violation of privacy, violation of fundamental rights and claims that the legislation had no reasonable purpose is State v. Murphy (Ariz.) 570 P.2d 1070.

DOUBLE PUNISHMENT

Convictions for conspiracy to sell, and possession of heroin for sale, do not violate double punishment since the acts necessary to convict for one are not the same acts necessary for conviction on the other. State v. Garcia, 570 P.2d 1080.

DRUGS AND NARCOTICS

Contraband in the defendant's home in an obvious or unsecluded place is sufficient circumstantial evidence to sustain a conviction for possession of marijuana. Here, the presence of marijuana in the open, in defendant's kitchen, was sufficient to sustain a conviction for possession against defendant's claim the marijuana was left by visitors. State v. Murphy (Ariz.) 570 P.2d 1070.

A co-conspirator is liable for the substantive crimes of other conspirators, thus where there was sufficient evidence defendant was part of a conspiracy to import heroin, he could properly be convicted of possession for sale of heroin that was in the physical custody of another co-conspirator. State v. Garcia, 570 P.2d 1080.

IDENTIFICATION

Allowing the victim, who had not been able to pick defendant out of either a photo lineup or a live lineup, and who first identified defendant at the Dessurealt hearing, to identify defendant at trial was not an abuse of discretion. There was an explanation for each failure to identify and the victim testified that the identification was based on the incident in a well lighted area and that he was certain defendant was the robber. State v. Myers (Ariz.) 570 P.2d 1252.

LESSER INCLUDED OFFFNSES

Test for whether an offense is a lesser included offense is whether the greater can be committed without necessarily committing the lesser. Disorderly conduct is not a lesser included offense of obstructing justice under this test. State v. O'Kelley, 570 P.2d 805.

OBSTRUCTING JUSTICE

Force, violence, or threats are not necessary in order to convict a defendant for obstructing justice; indirect, passive or circuitous impediments are sufficient. State v. O'Kelley, 570 P.2d 805.

OTHER CRIMES

Evidence of other crimes was properly admitted to prove identity, despite a positive identification by the victim, to corroborate the testimony of an accomplice, and to give the jury the full story. State v. Myers (Ariz.) 570 P.2d 1252.

PRISON CLOTHING

Failure to object, or even show in the record, that the defendant was forced to stand trial in prison clothing waived the matter on appeal. State v. Schlaefli (Ariz.) 570 P.2d 772.

OVERT ACT - CONSPIRACY

Any one of a number of acts, such as driving a vehicle owned by a co-conspirator to the house where the drugs were loaded, acting as lookout, throwing boxes out of a camper to make room to carry drugs, etc. was sufficient overt act to uphold the conspiracy convictions of defendants. The overt act of one may be attributed to all co-conspirators. State v. Green (Ariz.) 570 P.2d 755.

SENTENCE

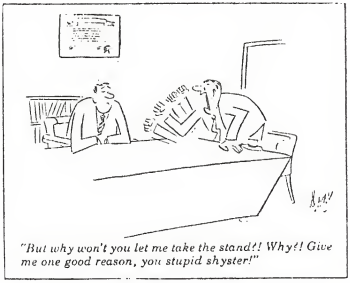
Testimony of a DEA agent that two unnamed confidential informants had testified before an investigative grand jury that defendant had sold them $1,305,000 of marijuana, and other items from two other confidential informants were properly considered when sentencing defendant. State v. Green, 570 P.2d 1265.

SUFFICIENCY OF EVIDENCE

Evidence that a probationer tried on a set of headphones, when he left, the headphones were gone and that he was chased and caught near where the headphones were found, was sufficient to revoke his probation for stealing the headphones. State v. Carter (Ariz.) 570 P.2d 763.

NOTE - ANGEL DUST

Unlike marijuana, all the experts agree phencyclidine, known variously as "Angel Dust", "PCP", and "Sheets", can have disasterous effects on the individual user. Since its first "street" appearance in 1967, PCP has come to be considered one of the most popular items in the drug community today. Although only nineteen deaths related to phencyclidine have been reported, where death has not occured, violent and bizarre behaviour, severe depression, and suicidal propensities have been associated with this drug. Persistent problems with memory, cognitive prosesses, vision, and speech are thought to be the products of chronic phencyclidine use.



"But why won't you let me take the stand?! Why?! Give me one good reason, you stupid shyster!"

ACCOMPLICES - GUILTY PLEA

While admitting the guilty plea of an accomplice in the trial of the defendant is error, defendant's failure to request a cautionary instruction and the fact that the defendant was caught in the act of the crime made the error harmless. State v. McDonald, 571 P.2d 656.

COMMENT ON SILENCE

Arguing that the defendant did nothing except wait to see if title came back from the state after defendant had reason to believe the pickup and camper were stolen was proper and was not a comment on the defendant's silence. State v. Flemming, 571 P.2d 268.

ENTRAPMENT

A change in the 9th Circuit Rule that the defendant must take the stand and admit the offense before he can claim entrapment did not change Arizona law, and it was proper to require that the defendant take the stand in order to raise the defense. State v. Montano, 571 P.2d 291.

PRIOR CONVICTIONS

In an old rules of evidence case the Arizona Supreme Court holds that counsel may impeach their own witness by "drawing the sting" and asking their own witness on direct exam if they had ever been convicted of a felony. The court noted that under new Rule 607 counsel for either side may impeach its own witness, and that drawing the sting did not bar the other side from bringing out details within evidentiary limits on cross-examination. State v. Fleming, 571 P.2d 268.

SEARCH AND SEIZURE

A statement in the affidavit that the persons to be searched were selling marijuana at all hours of the day and night, and the officer's statement that he feared the contraband would become nonexistent through sale or comsumption was sufficient "good cause" for the magistrate to issue a search warrant authorizing a nighttime search. State v. Jackson, 571 P.2d 266.

VOIR DIRE

It is not counsel's province to instruct the jury on matters of law during voir dire, so refusing to let counsel inquire about entrapment on voir dire was within the judge's discretion. State v. Montano, 571 P.2d 291.

CONSENT - SEARCH & SEIZURE

A good discussion of the reasons a defendant may voluntarily give consent to search even though he knows the contraband will be discovered is found in State v. Patterson, 571 P.2d 745.

ALIBI

Courts in their jury instructions should not disparage alibi evidence or instruct jury to treat it differently from evidence offered upon other issues, but prosecutor may comment upon ease with which alibi evidence may be manufactured or upon the credibility of the witness. Christian v. State, (Tenn.) 555 S.W.2d 863.

ARREST

Even though arresting officer was off duty, where officer had probable cause to arrest, he could do so, and charge of resisting arrest was proper after officer showed defendant his badge, identified himself, and informed defendant that he was under arrest. State v. Glover, 367 N.E.2d 1202.

CHAIN OF CUSTODY

Leaving marijuana contained in a sealed stapled bag in an office which was cleaned by trustees, who had been caught taking liquor and other items out of the office, did not break the chain of custody. The state does not have to negate all possibility of tampering, testimony that the bag was in the same condition was sufficient. Wilson v. State, (Okla.Cr.) 568 P.2d 1315.

DEATH

Because intervening medical error is not a defense to a defendant who has inflicted a mortal wound upon another, defendant did not have standing to challenge constitutionality of statute providing that a person will be considered dead when there is an irreversible cessation of spontaneous brain function under theory of vagueness or so insufficiently rigorous that respirator may have been prematurely terminated, causing victim's death. People v. Vanderford, (Mich.App.) 258 N.W.2d 502.

DOUBLE JEOPARDY - CONSECUTIVE SENTENCES

Where defendant plead guilty to robbery of two different people, so that there were two victims and two crimes, and where no collateral estoppel existed by reason of any prior acquittal on charges arising out of the incident, imposition of consecutive sentences on defendant did not subject him to double jeopardy. State v. Hardin (Neb.) 258 N.W.2d 245.

HEARSAY - SELF-SERVING STATEMENTS

Barring the defendant who did not testify from cross-examining police officers about a "confession" in which he denied involvement in the crime and tried to shift the blame to others was held proper. The "confession" was not a declaration against interest, but was self-serving hearsay, and was properly excluded. People v. Cunningham, (Colo.) 570 P.2d 1086.

IDENTIFICATION

Defendant's contention that his photo was the only one in a six photo array in which a person had on a white tank T-shirt is met with a refreshing, "So what? Each picture was unique in some fashion". The court goes on to say that the witness made the identification based solely on the face and that there was no testimony that the rapist wore a white tank T-shirt. People v. Lewis (Cal.App.) 142 Cal. Rptr. 218.

INEFFECTIVE COUNSEL

Where defendant had attempted suicide on several different occasions, and where he was initially declared incompetent to stand trial, it was reversible error for the defense counsel to fail to arrange for psychiatric evaluation of defendant regarding his criminal responsibility. People v. Bryant (Mich. App.) 258 N.W.2d 162.

OBSCENITY

Extending one's middle finger in a gesture known as "the finger" is a neutral act that gains its significance only from the idea it expresses, and though it might be beyond pale of constitutionally protected speech when directed against a particular person or group, it is not obscene since it is not erotic in a significant way and does not appeal to prurient interest in sex or portray sex in a patently offensive way. State v. Anonymous, 377 A.2d 1343.

RIGHT OF CONFRONTATION

Prior statements of witnesses for State which were read to jury were admissible in that all witnesses who had made statements were available at trial for cross-examination and for jury to observe their demeanor and judge their credibility, and there was no violation of defendant's right of confrontation. Flewallen v. State (Ind.) 368 N.E.2d 239.

ROBBERY

When defendant robbed one man at gunpoint of his wallet and watch in garage outside house and then entered house while holding gun on man and took wallets of two other men, purse from a woman, and pants containing money from another man, defendant could be convicted of five counts of armed robbery. People v. Thomas (Ill.) 367 N.E.2d 1281.

TIMELINESS

Requirement that motion to suppress be filed within ten days of date set for trial is constitutional, so where motion was filed two days before trial, court properly automatically denied motion and admitted evidence seized. Parham v. State, 555 S.W.2d 943.

WARRANTLESS SEARCH: FOURTH AMENDMENT WARRANT REQUIREMENT; MURDER SCENE EXCEPTION

The Supreme Court of Arizona holds that the search of a murder scene under certain circumstances is a valid exception to the constitutional warrant requirement. "We hold a reasonable, warrantless search of the scene of a homicide -- or of a serious personal injury with liklihood of death where there is reason to suspect foul play -- does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance. We choose not to limit this warrant requirement exception only to actual murders because immediate action may be important to determining the circumstances of death and because a reasonable search should not later be invalidated because the intended murder victim may be saved by a medical miracle. For the search to be reasonable the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a reasonable period following the time when the officials first learned of the murder (or potential murder)." State v. Mincey, 566 P.2d 273, Ariz., 1977).

AGGRAVATED HARASSMENT: APPLICABILITY TO C.B. RADIO COMMUNICATIONS

In an apparent case of first impression it has been held that a New York Statute defining aggravated harassment as a communication, with intent to harass, annoy, threaten or alarm, by mechanical or electronic means or by telephone or telegraph, or by mail or form of written communication, does not include citizen band radio transmissions. The Court stated that even if it did, the area of regulation of radio communications and citizen band radios has been fully preempted by the federal government. People v. Vogler, 395 N.Y.S.2d 881, Dewitt Town Ct., Onondaga Co., N.Y., 1977).

WEAPONS: LOADED FIREARM; "TASER"

Holding that the new weapon, "Taser", is a "loaded firearm" within the purview of the statute prohibiting the carrying of loaded firearms, see People v. Heffner, 139 Cal.Rptr. 45, Cal. App., 1977. The "Taser" is a weapon that shoots barbed contactors into its victim and temporarily incapacitates him with electric current. The "Taser" is a recent innovation in weaponry and has been the subject of some controversy, eleciting comment from a number of public officials regarding its legal status.

OBSTRUCTING GOVERNMENTAL ADMINISTRATION: CITIZENS BAND RADIO OPERATORS

The New York Court of Appeals has held that a message relayed by one citizens band radio operator to another pertaining to the location of a police radar speed checkpoint did not constitute the crime of obstructing governmental administration. The Court ruled that "interference" within the purview of the statute must be physical interference. Thus, "To say that there is a Smokey takin' pictures of the road does not subject the speaker to a year's imprisonment." People v. Case, 365 N.E.2d 872, N.Y., 1977).

TELECOMMUNICATIONS: EAVESDROPPING; CONSENT OF PARTICIPANTS

The Supreme Court of Michigan has held on the basis of United States v. White, 401 U.S. 745 (1975) warrantless electronic eavesdropping of telephone conversations, done with the consent of a participant to the conversation, does not violate the Fourth Amendment prohibition against unreasonable searches and seizures. In White the United States Supreme Court held that eavesdropping without a warrant on conversations between a defendant and an informant by means of a radio transmitter concealed on the informant's person did not violate the Fourth Amendment. The instant Court noted that on at least fourteen occasions the United States Supreme Court has declined to grant certiorari to review the decisions of the United States Court of Appeals holding that the Fourth Amendment does not preclude warrantless electronic participant monitoring. The cases are collected in footnote 13 of the instant opinion. While noting that a denial of certiorari is not an affirmance, the instant Court stated that it is a fact of some significance especially since there is no indication in subsequent decisions of the United States Supreme Court which would support the conclusion that the "doctrinal trend" has shifted from the view expressed in Mr. Justice White's opinion in the White case. People v. Drielick, 255 N.W.2d 619, Mich., 1977).

ADDENDUM TO REFERENCES ON EXCLUSION OF WITNESSES AND EYEWITNESS IDENTIFICATION

In the December, 1977 issue of the Montana Prosecutor two notes on the aforementioned subjects were presented. It has been brought to our attention by Dawson County Attorney, Richard A. Simonton that two important cases in the area of exclusion of witnesses are not mentioned in the note. Those cases are State v. Meidinger, 502 P.2d 58 (1972) and State v. Radi, 542 P.2d 1206 (1975).

Meidinger reaffirms the rule presented in the note but the Radi case changes things. There, the Court stated:

> ". . . we direct in the future where the trial judge grants a motion to sequester, that in the spirit of fairness, all witnesses who are to testify be excluded from the courtroom."

Notation of these two cases should be made in the article in order to prevent any error from occurring. Our thanks to Mr. Simonton.

Also, concerning the article on eyewitnesses identification, no mention of the case of State v. Miner, 33 ST. Rptr. 201, 546 P.2d 252 (1976) was made. That case should be included as a relevant case in Montana.

"What does he mean, 'his jury'?"

In light of two recent Supreme Court decisions, State v. Azure (decided December 30, 1977) and State v. Gladne, (decided February 14, 1978) it appears that providency of guilty pleas and adequacy of defense counsel issues are going to be continually litigated in the future. Experience has revealed that the adequacy of guilty plea inquiries varies from judge to judge. Such a procedure, lacking uniformity, lends itself to extensive litigation. As a result, there is contained hereafter a proposed guilty plea inquiry which some prosecutors may wish to try and convince their district court judges to use. It is submitted as a suggestion only to attempt to curb litigation in this area.

Also enclosed is a sample written plea bargin agreement that may be used in conjunction with the guilty plea inquiry. Recent studies have demonstrated that plea bargaining should be brought into the open and referenced on the record.

Utilization of the guilty plea inquiry and written pretrial agreements would assure a meaningful inquiry into the voluntariness and providency of a guilty plea. It would also deal somewhat with the question of adequacy of counsel by eliciting the accused's feelings concerning his counsel on the record. Finally, it would face the issue of plea bargaining head-on by referencing the agreement on the record.

It is submitted that the stipulation of fact included within the plea bargain agreement should be considered by the district court judge during his or her plea inquiry to assist in familiarizing him or her with the facts of the case. The portion of the plea bargain agreement setting forth the quantum of recommended punishment should be considered just prior to announcement of sentence so as to assure that counsel have fulfilled their obligations under the agreement. The remainder of the agreement should also be utilized by the judge after he or she inquires into the providence of the accused's plea and is satisfied that it is knowingly and voluntarily made. The judge must then ascertain whether the defendant understands the terms of the agreement utilizing the procedure set out in the guilty plea inquiry.

DISTRICT COURT JUDGE'S GUILTY PLEA INQUIRY

JUDGE: IT IS MY PURPOSE TO EXPLAIN FULLY THE MEANING AND EFFECT OF YOUR PLEA, AND TO CONDUCT AN INQUIRY SO THAT I MAY DETERMINE WHETHER YOU FULLY UNDERSTAND IT'S MEANING AND EFFECT. I SUGGEST THAT YOU HOLD A COPY OF THE CHARGE(S) IN YOUR HAND SO THAT YOU MAY REFER TO THEM READILY DURING THIS HEARING. YOUR PLEA OF GUILTY WILL NOT BE ACCEPTED UNLESS YOU UNDERSTAND ITS MEANING AND EFFECT. YOU ARE LEGALLY ENTITLED TO PLEAD NOT GUILTY, EVEN THOUGH YOU BELIEVE YOU ARE GUILTY, AND THUS PLACE UPON THE PROSECUTION THE BURDEN OF PROVING YOUR GUILT BEYOND REASONABLE DOUBT.

A PLEA OF GUILTY IS EQUIVALENT TO CONVICTION AND IS THE STRONGEST FORM OF PROOF KNOWN TO LAW. ON YOUR PLEA ALONE, WITHOUT RECEIVING ANY EVIDENCE, THIS COURT CAN FIND YOU GUILTY OF THE OFFENSE(S) TO WHICH YOU PLEAD GUILTY. YOUR PLEA WILL NOT BE ACCEPTED UNLESS YOU REALIZE THAT BY YOUR PLEA YOU ADMIT EVERY ACT OR OMISSION AND EVERY ELEMENT WITH RESPECT TO THE OFFENSE TO WHICH YOU PLEAD GUILTY, AND THAT YOU ARE PLEADING GUILTY BECAUSE YOU REALLY ARE GUILTY. IF YOU ARE NOT CONVINCED THAT YOU ARE IN FACT GUILTY, YOU SHOULD NOT ALLOW ANY OTHER CONSIDERATION TO INFLUENCE YOU TO PLEAD GUILTY.

DO YOU UNDERSTAND WHAT I HAVE JUST TOLD YOU?

ACCUSED: _____.

JUDGE: I AM GOING TO LIST THE ELEMENTS OF THE OFFENSE(S) TO WHICH YOU HAVE PLED GUILTY. THESE ARE THE FACTS WHICH THE PROSECUTION MUST PROVE BEYOND REASONABLE DOUBT BEFORE THE COURT CAN FIND YOU GUILTY IF YOU PLEAD NOT GUILTY. AS I STATE EACH OF THESE ELEMENTS, ASK YOURSELF WHETHER IT IS ABSOLUTELY TRUE AND WHETHER YOU WISH TO ADMIT THAT IT IS TRUE, AND THEN BE PREPARED TO DISCUSS EACH OF THESE ESSENTIAL FACTS WITH ME WHEN I HAVE FINISHED. THE ELEMENTS OF THE OFFENSE(S) WHICH YOUR PLEA OF GUILTY WOULD ADMIT ARE: (Read the elements of the offense(s). These should be specific as to alleged names, dates, places, amounts, and acts).

DO YOU UNDERSTAND EACH OF THE ELEMENTS OF THE OFFENSE(S).

ACCUSED: _____.

JUDGE: DO YOU HAVE ANY QUESTIONS ABOUT ANY OF THEM?

ACCUSED: _____.

JUDGE: DO YOU UNDERSTAND THAT YOUR PLEA OF GUILTY WOULD ADMIT THAT EACH OF THESE ELEMENTS ACCURATELY DESCRIBES WHAT YOU DID?

ACCUSED: _____.

JUDGE: DO YOU BELIEVE, AND ADMIT, THAT TAKEN TOGETHER THESE ELEMENTS CORRECTLY DESCRIBE WHAT YOU DID?

ACCUSED: _____.

(Here the judge should elicit the facts concerning the offense(s) to which accused has pled guilty. The stipulation of fact from the Pretrial Agreement should be presented at this time to assist the judge in becoming familiar with the specific facts of the case).

JUDGE: DO YOU HAVE ANY QUESTIONS AT THIS TIME?

ACCUSED: _____.

JUDGE: BY YOUR PLEA OF GUILTY, YOU WAIVE - AND BY "WAIVE", I MEAN "GIVE UP" - CERTAIN IMPORTANT RIGHTS. HOWEVER, YOU WAIVE THESE RIGHTS ONLY AS TO THE FINDINGS OF THE OFFENSE(S) TO WHICH THE PLEA IS ENTERED. YOU RETAIN THESE RIGHTS AS TO OFFENSE(S) TO WHICH YOU PLEAD NOT GUILTY AND OTHER PROCEEDINGS IN THIS CASE.

DO YOU UNDERSTAND WHAT I HAVE JUST TOLD YOU?

ACCUSED: _____.

JUDGE: THESE RIGHTS ARE:

FIRST, THE RIGHT AGAINST SELF-INCRIMINATION - THAT IS THE RIGHT TO SAY NOTHING AT ALL.

SECOND, THE RIGHT TO A TRIAL OF THE FACTS BY THIS COURT OR A JURY - THAT IS, THE RIGHT TO HAVE THIS COURT OR A JURY DECIDE WHETHER OR NOT YOU ARE GUILTY BASED UPON EVIDENCE WHICH THE STATE WILL PRESENT, AND ON ANY EVIDENCE YOU MAY INTRODUCE.

THIRD, THE RIGHT TO BE CONFRONTED BY AND TO CROSS-EXAMINE ANY WITNESS AGAINST YOU.

DO YOU UNDERSTAND WHAT THESE RIGHTS ARE?

ACCUSED: _____.

JUDGE: DO YOU FURTHER UNDERSTAND THAT BY PLEADING GUILTY YOU NO LONGER HAVE THESE RIGHTS?

ACCUSED: _____.

JUDGE: MR. _____ HAVE YOU AS DEFENSE COUNSEL HAD AMPLE TIME AND OPPORTUNITY TO DISCUSS THE CASE WITH THE ACCUSED?

DEFENSE COUNSEL: _____.

JUDGE: HAVE YOU, IN FACT, CONSULTED FULLY WITH YOUR DEFENSE COUNSEL AND RECEIVED THE FULL BENEFIT OF HIS ADVICE?

ACCUSED: _____.

JUDGE: ARE YOU SATISFIED THAT YOUR COUNSEL'S ADVICE IS TO YOUR OWN BEST INTEREST?

ACCUSED: _____.

JUDGE: ARE YOU SATISFIED WITH YOUR DEFENSE COUNSEL?

ACCUSED: _____.

JUDGE: ARE YOU PLEADING GUILTY VOLUNTARILY AND OF YOUR OWN FREE WILL?

ACCUSED: _____.

JUDGE: HAS ANYONE MADE ANY THREAT OR TRIED IN ANY OTHER WAY TO FORCE YOU TO PLEAD GUILTY?

ACCUSED _____.

JUDGE: ARE YOU PLEADING GUILTY BECAUSE YOU FEEL IN YOUR OWN MIND THAT YOU ARE GUILTY?

ACCUSED: _____.

JUDGE: DO YOU UNDERSTAND THAT EVEN THOUGH YOU FEEL THAT YOU ARE GUILTY, YOU HAVE A LEGAL AND MORAL RIGHT TO PLEAD NOT GUILTY AND PLACE THE BURDEN ON THE GOVERNMENT TO PROVE YOUR GUILT BY LEGAL AND COMPETENT EVIDENCE BEYOND REASONABLE DOUBT?

ACCUSED: _____.

JUDGE: DOES THE STATE EXPECT TO PRESENT EVIDENCE OF PREVIOUS CONVICTIONS THAT WOULD AFFECT THE MAXIMUM PERMISSIBLE PUNISHMENT: (YES) (NO)

JUDGE: ON YOUR PLEA OF GUILTY ALONE, YOU COULD LAWFULLY BE SENTENCED TO THE MAXIMUM PUNISHMENT AUTHORIZED. IN THIS CASE, THE MAXIMUM PUNISHMENT FOR THE OFFENSE(S) TO WHICH YOU HAVE PLEADED GUILTY IS_____.

DO YOU HAVE ANY QUESTIONS AS TO THE SENTENCE THAT COULD BE IMPOSED AS A RESULT OF A PLEA OF GUILTY?

ACCUSED: _____.

JUDGE: (TO DC) IS THERE A PRETRIAL AGREEMENT IN CONNECTION WITH THE PLEA?

DEFENSE COUNSEL: _____.

(The judge obtains a copy of the agreement. He should insure that he does not become aware of the quantum of punishment recommendation of the County Attorney (Annex II of the agreement) until just prior to announcement of sentence. The Judge should also insure that a copy of the complete pretrial agreement is furnished to the accused.)

JUDGE: THIS DOCUMENT APPEARS TO BE A PRETRIAL AGREEMENT BETWEEN YOU AND THE COUNTY ATTORNEY. DO YOU HAVE A COPY OF IT?

ACCUSED: _____.

JUDGE: DID YOU SIGN IT?

ACCUSED: _____.

JUDGE: DID YOU READ IT BEFORE YOU SIGNED IT?

ACCUSED: _____.

JUDGE: DID YOU MAKE THIS AGREEMENT FREELY AND VOLUNTARILY?

ACCUSED: _____.

JUDGE: WHEN YOU MAKE A PRETRIAL AGREEMENT WITH THE COUNTY ATTORNEY, YOU AGREE TO PLEAD GUILTY AND HE AGREES TO SET A LIMIT ON THE AMOUNT OF SENTENCE HE WILL RECOMMEND. NEAR THE END OF THIS TRIAL, THIS COURT WILL SENTENCE YOU FOR THE OFFENSE(S) TO WHICH YOU PLEAD GUILTY. DO YOU REALIZE THAT ALTHOUGH THE COURT WILL CONSIDER THE RECOMMENDATION OF THE COUNTY ATTORNEY, THE COURT IS IN NO WAY BOUND BY THAT COUNTY ATTORNEY'S RECOMMENDATION WHEN IMPOSING SENTENCE?

ACCUSED: _____.

JUDGE: DO YOU HAVE ANY QUESTIONS ABOUT ANY OF THE TERMS CONTAINED IN THE AGREEMENT?

ACCUSED: _____.

JUDGE: DO COUNSEL FOR BOTH SIDES AGREE THAT THE WRITTEN AGREEMENT ENCOMPASSES ALL OF THE UNDERSTANDINGS OF THE PARTIES?

COUNTY ATTORNEY: _____.

DEFENSE COUNSEL: _____.

JUDGE: IT IS IMPORTANT THAT YOU UNDERSTAND WHAT YOU AND THE COUNTY ATTORNEY HAVE AGREED TO. DO YOU UNDERSTAND?

ACCUSED: _____.

JUDGE: DO YOU UNDERSTAND WHAT THE RECOMMENDATION ON YOUR SENTENCE WRITTEN OUT THERE MEANS?

ACCUSED: _____.

JUDGE: IS THAT THE RECOMMENDATION THAT YOU AND THE COUNTY ATTORNEY AGREED TO?

ACCUSED: _____.

(Other conditions of the agreement may also be subject to inquiry such as the agreement to stipulate or an agreement to testify.(example) Judge: The agreement also states that you have agreed to testify as a witness in the case of _____. Do you understand that if you refuse to testify in that case, that your agreement would be canceled?
Accused: _____.

JUDGE: HAS ANYONE MADE ANY PROMISES TO YOU THAT ARE NOT WRITTEN DOWN IN AN ATTEMPT TO GET YOU TO PLEAD GUILTY?

ACCUSED: _____.

JUDGE: ARE YOU PLEADING GUILTY NOT ONLY TO GET THE BENEFITS OF YOUR PRETRIAL AGREEMENT BUT ALSO BECAUSE YOU FEEL IN YOUR OWN MIND THAT YOU REALLY ARE GUILTY?

ACCUSED: _____.

JUDGE: DO YOU HAVE ANY FURTHER QUESTIONS AS TO THE MEANING AND EFFECT OF A PLEA OF GUILTY?

ACCUSED: _____.

JUDGE: DO YOU UNDERSTAND THE MEANING AND EFFECT OF YOUR PLEA OF GUILTY?

ACCUSED: _____.

JUDGE: TAKE TIME NOW TO CONSULT WITH YOUR COUNSEL AGAIN AND THEN ADVISE ME WHETHER YOU UNDERSTAND THE THINGS WE HAVE DISCUSSED AND STILL DESIRE TO PLEAD GUILTY.

ACCUSED: _____.

JUDGE: I FIND THAT THE PLEA OF GUILTY IS MADE VOLUNTARILY AND WITH FULL KNOWLEDGE OF ITS MEANING AND EFFECT. I FURTHER SPECIFICALLY FIND THAT THE ACCUSED HAS KNOWINGLY, INTELLIGENTLY, AND CONSCIOUSLY WAIVED HIS RIGHT AGAINST SELF-INCRIMINATION, TO A TRIAL OF THE FACTS BY THIS COURT OR A JURY, AND TO BE CONFRONTED BY THE WITNESSES AGAINST HIM. ACCORDINGLY, THE PLEA IS PROVIDENT AND IS ACCEPTED.

HOWEVER, YOU ARE ADVISED THAT YOU MAY REQUEST A WITHDRAWAL OF SUCH PLEA AT ANY TIME BEFORE SENTENCING IS ANNOUNCED, AND IF YOU HAVE ANY SOUND REASON FOR YOUR REQUEST, I WILL GRANT IT.

ACCUSED: _____.

JUDGE: YOUR PLEA IS ACCEPTED.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTP OF LEWIS & CLARK

CAUSE NO. 4658

STATE OF MONTANA (Plaintiff)
v.
FREDERICK SMITH (Defendant)

OFFER TO PLEAD GUILTY

I, Frederick Smith, the accused in a case now pending in Lewis and Clark County, Montana have had an opportunity to examine the charges brought against me, including allied investigative documents, and after consultation with my defense counsel, Mr. Pete Lacey, and being fully advised that I have a legal and moral right to plead not guilty to the charges and to place the burden of proof in proving my guilt upon the prosecution, offer to plead guilty to the charges as they appear on Annex I.

The offer to plead guilty to the attached charges is made on the condition that the County Attorney will abide by the provisions set forth in Annex II.

I agree to the written stipulation of fact to be used only in pursuance of this agreement to inform the judge of matters pertinent to the inquiry of my guilty plea and to an appropriate sentence.

I understand this offer and agreement and the fact that I have agreed to enter into the stipulation of fact as attached hereto. If my plea is not accepted, the stipulation of fact is null and void.

I futher understand that this agreement will be automatically cancelled upon the happening of any of the following events:

1. The withdrawal by either party from the agreement prior to trial;

2. The changing of my plea by anyone during trial from guilty to not guilty;

3. The refusal of the court to accept my plea of guilty; or

4. The modification at any time of this negotiated plea in any manner without my express consent.

PETE LACEY
Defense Counsel

FREDERICK SMITH
Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF MONTANA IN AND FOR THE COUNTY OF LEWIS & CLARK

CAUSE NO. 4658

STATE OF MONTANA)
(Plaintiff))
v.) PRETRIAL AGREEMENT
FREDERICK SMITH,)
(Defendant))

I, Frederick Smith, offer to plead guilty to the charges as they appear on Annex I provided the Lewis and Clark County Attorney, or his designated representative will recommend no sentence in excess of three years in the Montana State Prison suspended on the conditions that: (1) during the period of suspension I will be placed under the jurisdiction of the Department of Institutions, Division of Adult Parole and Probation and will be subject to all rules and regulations of that department, and (2) that I will pay to Lewis and Clark County a fine of $250.00 on or before six months from the date sentence is imposed. I realize that on my plea of guilty alone I could lawfully be sentenced to the maximum punishment authorized and that the recommendation of the County Attorney in no way binds the District Court Judge when imposing sentence.

PETE LACEY
Defense Counsel

FREDERICK SMITH
Defendant

The foregoing offer to plead guilty is (accepted) (Not accepted).

CHARLES A. GRAVELY
County Attorney
Lewis and Clark County

Annex II - Offer to Plead Guilty

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF LEWIS & CLARK

CAUSE NO. 4658

STATE OF MONTANA, (Plaintiff)
v.
FREDERICK SMITH, (Defendant)

STIPULATION OF FACT

IT IS HEREBY AGREED BY AND BETWEEN THE DEFENSE COUNSEL AND THE COUNTY ATTORNEY, WITH THE EXPRESS CONSENT OF THE ACCUSED THAT:

On or about September lo, 1976, the accused was stopped by Deputy Sheriff Terry Lambert due to a headlight being out as he was driving west on Custer Avenue in Helena in Lewis and Clark County. As Lambert approached the car the accused told him not to touch his car or he'd "kick the crap out of him." Lambert responded that he merely wished to check the accused's license and registration. The accused refused to cooperate stating that "you can't do anything to me, so bug off." At that point Lambert arrested the accused, secured his vehicle and returned to the Sheriff's Office with the accused. After booking the accused, Lambert returned to his car to inventory its contents and have the car impounded. During the inventory in the trunk were found four individually wrapped packages of Marijuana weighing 356 grams.

DATED this____day of_____, 1976.

FREDERICK SMITH
Defendant

MICHAEL McCABE
Deputy County Attorney

PETE LACEY
Defense Counsel

NATIONAL COLLEGE OF DISTRICT ATTORNEYS

MASTER CALENDAR OF PROGRAMS FOR PROSECUTORS

	DECEMBER	
- 2	Alabama District Attorneys Association Forensic Science Seminar	Montgomery, Alabama
- 3	Ohio Prosecuting Attorneys Association Annual Meeting	
- 3	Washington Prosecutor Attorneys Association Trial Advocacy Seminar (NCDA State Course)	Seattle, Washington
- 9	Advanced Organized Crime Seminar (NCDA)	Columbus, Ohio
- 9	Montana Rape & Homicide Symposium (NCDA State Course)	Billings, Montana
- 10	New Mexico State Meeting	Las Cruces, New Mexico
- 16	Michigan State Prosecutors Training Association Basic Training	Lansing, Michigan
- 16	Illinois Winter Meeting	Chicago, Illinois
	JANUARY	
- 6	Appellate Advocacy (NCDA)	Houston, Texas
- 6	Michigan State Prosecutors Training Association Chief APAs Conference	Lansing, Michigan
- 13	Alabama District Attorneys Association Mid-Winter Meeting	Birmingham, Alabama
- 20	Prosecutor's Office Administrative Course III (NCDA)	Houston, Texas
	Michigan State Prosecutors Training Association Evidence I (video)	Lansing, Michigan
- 21	Mississippi Prosecutor Coordinators Annual Training Conference	Jackson, Mississippi
- 26	NCDA/KCDAA Trial Techniques Institute	Topeka, Kansas
- 29	Maryland State's Attorneys Association Mid-winter Conference	Oakland, Maryland
	Kansas County & District Attorneys Association Annual Attorney General Call	Topeka, Kansas
- Feb. 1	Prosecution of Major Fraud (NCDA)	San Diego, California
9 - Feb. 2	Juvenile Justice Conference NDAA/NCJCJ	San Francisco, California

FEBRUARY

9 - 10	Pennsylvania District Attorneys Association Mid-winter Meeting, Trial Techniques, Budgeting and Office Management	Hershey, Pennsylvania
9 - 14	American Bar Association Mid-winter Meeting	New Orleans, Louisiana
12 - 15	Pretrial Problems in Prosecution (NCDA)	Denver, Colorado
21 - 24	Colorado District Attorneys Association Trial Techniques Seminar	Denver, Colorado
26 - Mar. 2	Basic Organized Crime Seminar (NCDA)	Indianapolis, Indiana
- Mar. 3	NDAA Mid-winter Meeting	San Francisco, California

MARCH

	Michigan State Prosecutors Training Association Evidence II (video)	Lansing, Michigan
- 9	Juvenile Justice Conference NDAA/NCJCJ	Baton Rouge, Louisiana
- 9	Colorado District Attorneys Association Trial Techniques Seminar	Denver, Colorado
- 17	Advanced Prosecutor's Investigators School (NCDA)	
- 18	Trial Techniques for Prosecutors (NCDA)	Los Angeles, California

APRIL

- 8	Mississippi Prosecutor Coordinators Annual Spring Conference	Biloxi, Mississippi
- 12	Prosecution of Crimes Against Persons (NCDA)	Orlando, Florida
- 28	Advanced Organized Crime (NCDA)	Dallas, Texas
- May 3	Michigan Advanced Prosecutor Training	Higgins Lake, Michigan

MAY

- 11	Michigan State Prosecutors Training Association Administrative/Clerical Seminar	Higgins Lake, Michigan
- 26	Prosecutor's Office Administrator Course I (NCDA)	Houston, Texas
- 26	Michigan State Prosecutors Training Association Prosecutor Drug Cases	Lansing, Michigan

JUNE

- 3	Mississippi Prosecutor Attorneys Annual Business Meeting	Biloxi, Mississippi
- 8	Iowa County Attorneys Association and Prosecuting Attorneys Council Conference	Okoboji, Iowa
- 9	Michigan State Prosecutors Training Association Summer Intern Training	Lansing, Michigan

11 - 17	Executive Prosecutor Course (NCDA)	Houston, Texas

JULY

9 - 13	Pennsylvania District Attorneys Association 1978 Annual Meeting	Hershey, Pennsylvania
9 - 14	NDAA Annual Meeting	Hershey, Pennsylvania
16 - Aug. 4	Career Prosecutor Course (NCDA)	Houston, Texas
26 - 29	Michigan Prosecutor Attorneys Association 51st Annual Conference	Mackinac Island, Michigan

AUGUST

3 - 9	American Bar Association Annual Meeting	New York, New York

Calendar Items Should Be Sent To Director Of Training, NCDA, College of Law, University of Houston, Houston, Texas 77004

A COOPERATIVE PROJECT OF NAPC-NCDA